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Attorneys for the Canepa Group

**UNITED STATE BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

In re:	)	Case No. BK-S-06-10725-LBR
	)	Case No. BK-S-06-10726-LBR
USA COMMERCIAL MORTGAGE COMPANY,	)	Case No. BK-S-06-10727-LBR
	)	Case No. BK-S-06-10728-LBR
Debtor.	)	Case No. BK-S-06-10729-LBR

In re:	)	Chapter 11
USA CAPITAL REALTY ADVISORS, LLC,	)	
	)	<b>Jointly Administered Under</b>
Debtor.	)	<b>Case No. BK-S-06-10725-LBR</b>

In re:	)
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,	)
	)
Debtor.	)

In re:	)
USA CAPITAL FIRST TRUST DEED FUND, LLC,	)
	)
Debtor.	)

In re:	)
USA SECURITIES, LLC,	)
	)
Debtor.	)

Affects:	)
<input checked="" type="checkbox"/> All Debtors	)
<input type="checkbox"/> USA Commercial Mortgage Company	)
<input type="checkbox"/> USA Securities, LLC	)
<input type="checkbox"/> USA Capital Realty Advisors, LLC	)
<input type="checkbox"/> USA Capital Diversified Trust Deed Fund, LLC	)
<input type="checkbox"/> USA First Trust Deed Fund, LLC	)

Date: June 5, 2006  
 Time: 9:30 a.m.

**OPPOSITION TO DEBTOR'S MOTION TO TEMPORARILY HOLD FUNDS**  
**PENDING A DETERMINATION OF THE PROPER RECIPIENTS**

1 The Canepa Group consists of seven Direct Lenders<sup>1</sup> whose original investments in 13  
 2 different loans<sup>2</sup> exceed \$3.1 million. They oppose<sup>3</sup> the Motion to Temporarily Hold Funds Pending  
 3 a Determination of the Proper Recipients ("Motion") because this relief must be sought by Adversary  
 4 Complaint and accompanying motions for extraordinary relief, not by contested matter.

## 5 POINTS AND AUTHORITIES

### 6 **A. PRELIMINARY STATEMENT**

7 The Debtors admit pre-petition fiduciary breaches of their duties and pre-petition  
 8 irregularities in handling the funds entrusted to them by others – "irregularities" that were not the  
 9 result of any action or inaction by the Direct Lenders. Yet, the Debtors now seek this Court's  
 10 permission to continue their pre-petition "irregularities" by requesting an order from this Court that  
 11 will permit them to remain in breach of the loan servicing agreements by refusing to disburse any  
 12 funds to Direct Lenders and Direct Investors.

13 One of the articulated reasons for this motion is to enable the Debtors to calculate the amount  
 14 of their uncollected servicing fees and to determine their setoff rights. As an initial matter, setoff  
 15 is generally asserted as a defense to the claims of others, not as an affirmative right to relief. Setoff  
 16 is also an equitable remedy within the Court's discretion, and the Debtors will apparently attempt  
 17 to assert certain alleged setoff rights notwithstanding their admittedly unclean hands arising from  
 18 their direct involvement in the "irregularities" that have created the need for any relief.

19 Even more astounding is the fact that the Debtors seek to continue to hold these funds solely  
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21 <sup>1</sup> Scott K. Canepa; Shawntelle Davis-Canepa; Scott K. Canepa Defined Benefit Pension  
 22 Plan; Evelyn G. Canepa Trust, Evelyn G. Canepa and Scott Krusee Canepa Trustees; Gary T. and  
 23 Lori R. Canepa, Trustees of the G. & L. Trust dated 11/25/91; Louis John Canepa Trustee of the  
 24 Louis John Canepa Revocable Trust dated 6/18/98; and Michael Wagnon (collectively "the Canepa  
 25 Group")

26 <sup>2</sup> 3685 Fernando Road, Boise Gowan, Brookmere, Bundy Canyon, Cabernet, Clear  
 27 Creek, Fiesta/Murietta, Hasley Canyon, Margarita Annex, Opaque, Placer Vineyards, Rio  
 28 Bravo/SVRP, and Southern California Land Development.

<sup>3</sup> The Canepa Group apologizes to the Court and counsel for the late filing of this  
 opposition; however, their counsel encountered technical and other difficulties in preparing and  
 filing this document while traveling out of the country, causing an unavoidable delay in filing and  
 serving this opposition.

1 based upon this contested matter, and not pursuant to an appropriate adversary complaint and  
 2 accompanying motion or motions for extraordinary relief. The due process and other protections  
 3 provided by an adversary complaint should not be circumvented by requesting such extraordinary  
 4 relief by Motion. The Motion must therefore be denied, and the Debtors must be ordered to fully  
 5 perform their post-petition obligations under the Loan Servicing Agreements, which include making  
 6 disbursements to Direct Lenders and Direct Investors. To do otherwise would be to allow USA  
 7 Commercial to continue to breach the Loan Servicing Agreements with impunity.

## 9 **B. LEGAL ARGUMENT**

### 10 **1. Debtors' Cases Do Not Support the Relief Requested**

11 The Debtors argue that their request for relief is analogous to that approved by a Nevada  
 12 State Court in an old Nevada receivership case, Ex Rel. Irving National Bank v. District Court, 217  
 13 P. 962 (1923), while completely ignoring the additional procedural and due process protections  
 14 present in that case. In Nevada, a receivership case is commenced by the filing of a separate action,  
 15 and the complaint must seek more than the mere appointment of a receiver since an appointment,  
 16 if made, is "ancillary to or in aid of the action brought." *See* NRS 32.010; and Ex rel. Nenzel v.  
 17 District Court, 49 Nev. 145, 156-57, 241 P.317, 320-21 (1925). Additionally, a receiver must be an  
 18 independent third party, not an employee of the party seeking the relief. *Id.* The Nevada State Court  
 19 has discretion to require the receiver to post a bond, but in Federal Court, a receiver is always  
 20 required to post a bond. *See, Kraemer v. Kraemer*, 79 Nev. 287, 293, 382 P.2d 394, 397 (1963);  
 21 Bowler, 70 Nev. at 387, 269 P.2d at 841; Johnston, 63 Nev. at 15, 158 P.2d at 554. *See also*, LR 210-  
 22 9 for the District of Nevada.

23 By this Motion, the Debtors and Mr. Allison propose a summary proceeding analogous to  
 24 an *ex parte* request for relief, or a summary proceeding resulting in court approval to continue to hold  
 25 the property of others. The due process concerns inherent in the proposed Motion should be rejected  
 26 for the same reasons that an *ex parte* request for receiver was rejected by the Nevada Supreme Court.

27 Due process of law requires an orderly proceeding, adapted to the  
 28 nature of the case, in which the citizen has an opportunity to be heard,  
 and to defend, enforce, and protect his rights. A hearing and an

1 opportunity to be heard is absolutely essential. We cannot conceive  
 2 of due process of law without this. . . . Another fatal objection to the  
 3 irregularity of these proceedings is that the appellants were deprived  
 4 of the possession of their property without having an opportunity of  
 5 being heard, and without any sufficient cause for such a summary  
 proceeding. By the settled practice of the court in ordinary suits, a  
 receiver cannot be appointed ex parte before the defendant has had  
 an opportunity to be heard in relation to his rights.

6 State ex rel. Howell v. Wildes, 34 Nev. 94, 116 P.595, 599 (1911) (quoting Stuart v. Palmer, 74 N.Y.  
 7 184 and Verplanck v. Mercantile Ins. Co., 2 Paige 450). The summary proceeding proposed by this  
 8 Motion is devoid of due process protections and it should likewise not be sanctioned by this Court.

9 Mr. Allison is the Chief Restructuring Officer for the Debtors; in essence, an independent  
 10 contractor employed by the Debtors. Although a debtor-in-possession does owe certain fiduciary  
 11 duties to the debtor, creditors and interested parties, those fiduciary obligations cannot under any  
 12 stretch of the imagination be considered analogous to that of an independent receiver appointed by  
 13 the Court. This especially true in light of the Debtors' admissions that: (1) there were pre-petition  
 14 irregularities in loan servicing – due to no fault of the Direct Lenders; and (2) the only “property of  
 15 the estate” arising from these collections is limited to loan extension fees and loan servicing fees,  
 16 consisting of a very small portion of the funds presently held by the Debtors.

17 As demonstrated above, to act in the nature of a receiver, Nevada law requires much more  
 18 than this request for total disregard of USA Commercial's contractual and statutory fiduciary duties  
 19 owed to Direct Lenders. These due process and other concerns cannot simply be ignored in order to  
 20 facilitate further analysis by the Debtors with respect to the dollar amount of USA Commercial's  
 21 unpaid fees – which USA Commercial simply assumes that it is entitled to receive – and the extent  
 22 of the Debtors' defenses to Investor demands for immediate payment of funds collected by USA  
 Commercial.

23 The Debtors' reliance upon In re Builders Capital Services, Inc., 317 B.R. 603 (Bankr. W.D.  
 24 N.Y. 2004) is likewise misplaced. That case involved a Ponzi scheme that landed the Debtor's three  
 25 principals in jail. Notes and mortgages issued by the Debtor were improperly “given to a purported  
 26 agent acting without authority from the investor,” which invalidated the mortgages under New York  
 27 law. Interpreting New York law regarding mortgages, the Court held that “[n]either the debtor nor  
 28

any individual investor holds a valid legal interest in the disputed notes and related mortgages.” New York law was further applied to recognize an equitable interest in the notes and mortgages and to enable the Trustee to administer them for the benefit of all persons with competing claims to the proceeds. 317 B.R. at 608, 610. Clearly, the approach adopted by the Builders Capital Court was required by the extreme facts presented to it; however, those same extreme facts are not present here and the Court should not rely upon this case to justify the relief requested in the Motion.

The rest of the cases cited by the Debtors in support of this request for extraordinary relief outside of an appropriate adversary complaint are merely more examples of extreme fact patterns which do not exist here. *See In re Corporate Financing, Inc.*, 221 B.R. 671 (Bankr. E.D.N.Y. 1998) (court found mortgages were not true mortgage participation loans but were instead unsecured loans based upon the repayment guarantees when the loans were in non-performing status); *In re Sprint Mortgage Bankers Corp.*, 164 B.R. 224 (Bankr. E.D.N.Y. 1994) (same); *In re Lemmons & Associates, Inc.*, 67 B.R. 198 (Bankr. Nev. 1986) (transactions in question were not loans by investors secured by interest in notes, but were instead sales of interests in notes, limiting investors to equitable claims only).

## **2. An Adversary Complaint is the Necessary Prerequisite to this Motion**

The cases cited by the Debtors in support of their motion are quite instructive on the question of whether or not the relief requested may be obtained by contested matter instead of adversary complaint, each answering that question in the negative. For example, in *Sprint Mortgage Bankers Corp.*, *supra.*, the Court’s decision was rendered in the context of an adversary proceeding which had been commenced to determine the priority and extent of the notes and proceeds thereof. Additionally, the Court in the *Lemmons & Associates*, *supra.*, rendered its decision after the consolidated trial of five “test cases” which contained common legal issues, but presented different facts. Further, the Court in *Corporate Financing, Inc.*, rendered its decision in the context of the debtor’s adversary complaint for declaratory and other relief.

Before such extraordinary relief can be granted to the Debtors, the appropriate procedural and due process requirements must be satisfied. Fed.R.Bankr.P. 7001(2) requires the filing of an adversary complaint to determine the validity, priority or extent of a lien or other interest in

1 property. *See In re Golden Plan of California, Inc.*, 829 F.2d 705 (9<sup>th</sup> Cir. 1986) (Trustee's request  
 2 for "special instructions" contravened Rule 7001 and its requirement for an adversary complaint, and  
 3 it also imposed on the investors the burden of challenging his actions.) Moreover, Fed.R.Bankr.P.  
 4 7064 and 7065 govern the seizure of property and the issuance of injunctive relief for which the  
 5 posting of a bond is required, and Nevada law governing pre-judgment writs of attachment likewise  
 6 requires procedural and other protections as a condition of granting that extraordinary relief. The  
 7 Debtors' Motion clearly does not satisfy the requirements of these rules in any respect, and it must  
 8 therefore be denied.

9 Furthermore, until USA Commercial Mortgage Company successfully cures and assumes  
 10 each one of the executory Loan Servicing Agreements, it cannot simply assume that servicing fees  
 11 derived from each contract are, in fact, property of the estate. *See e.g., In re Lovitt*, 757 F.2d 1035  
 12 (9<sup>th</sup> Cir. 1985) (executory contract is not property of the estate until assumed pursuant to Section  
 13 365); and *In re Qintex Entertainment, Inc.*, 950 F.2d 1492 (9<sup>th</sup> Cir. 1991) (same). Hence, to the extent  
 14 that USA Commercial claims a property interest in uncollected service fees it claims are property  
 15 of the estate, USA Commercial must first comply with the requirements to assume each of those  
 16 contracts. Otherwise, these contracts and their proceeds in the form of loan servicing and other fees  
 17 are not property of the estate.

### 18 **C. CONCLUSION**

19 The Motion seeks Court approval for the Debtors to continue to hold the property of third  
 20 party Direct Lenders and Direct Investors, in breach of every Loan Servicing Agreement and in  
 21 breach of its fiduciary duties under Nevada law, without any of procedural and due process  
 22 protections required by the Nevada law and the Federal Rules of Bankruptcy Procedure. The stated  
 23 purpose for the Motion is to allow the Debtors to complete their investigation and shore up their  
 24 defenses before initiating or responding to any litigation concerning the allegedly competing interests  
 25 in the funds held by the Debtors. Such an overreaching request should not be sanctioned by this  
 26 Court. The Motion improperly contravenes Fed.R.Bankr.P. 7001, and like the court in *Golden Plan*,  
 27 *supra.*, this Court should not sanction the Debtors' attempts to obtain relief that impacts the property  
 28 rights of the Direct Lenders, unless such relief is sought in the form of an adversary complaint.

1 The Motion must be summarily denied, and the Debtors should be ordered to immediately  
2 proceed with payment of all withheld disbursements to Direct Lenders and Direct Investors.

3 Dated: May 24, 2006.

4 Respectfully submitted,

5 LIONEL SAWYER & COLLINS

6 /s/ Laurel E. Davis

7 By \_\_\_\_\_  
8 Laurel E. Davis

9 Attorneys for the Canepa Group  
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